POINTS TO BE CONSIDERED IN WORKMEN'S COMPENSATION LEGISLATION

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In this brief paper, I shall emphasize some points that lawmakers must consider in attempting to change the basis for dealing with industrial accidents.

First, comes the change in public opinion towards them, and the reason for it. In 1905, when ten years' management of innumerable accidents here, drove me over to England to investigate the workings of the English Compensation Act of 1897, in the hope of finding a way out of the grave abuses that resulted from the continued regulation of them by the law of negligence, the question in the United States was then, (if there was any,) "is any change necessary?" Now, after free discussion and consideration of the conditions and abuses that necessarily surround the application of the law of negligence to modern industrial conditions, the question has become "What kind of a change is necessary?"

One speaks of the change that has taken place in industrial conditions since the common law of negligence was first adopted as the basis of treatment of accidents of industry.

To get this forcibly before us, let us stop for a moment and read a short accurate description of those early conditions that first led judges to apply the common law of negligence to industrial accidents, and then contrast them with conditions of industry to-day. It is conceivable that then, little injustice resulted from such application, and perhaps some reason then existed for asking, "Who has been negligent?" when an accident occurred. There is, no doubt, too, that then, if an accident with resulting hardship occurred, it was dealt with entirely without any recourse to law at all; early decisions as to such actions in the law books prior to 1841 are strangely lacking; now the books are crowded with them. The description I read from was written years ago by one who has since attained

literary distinction, but who herself was actually a worker in the mills at the time she describes:

"Lowell, in 1832, was a factory village in which five corporations were started and were building cotton mills. Stories were being told all over the country of the new factory-place and of the high wages offered. Stage coaches, canal boats, large covered baggage wagons, brought mechanics and machinists with their home-made chests of tools. The stage coach could not fetch and carry fast enough, and in 1835 the Boston and Lowell Railroad, almost the first enterprise of this kind in the United States, went into operation. Daughters of professional men, teachers, and of farmers, with others, comprised the operatives, whose incentive to labor was often to give a college education to a son or brother.

The conditions of work were easy; frequently a girl would sit and rest twenty or thirty minutes at a time; they were not driven: the mule and the spinning-jenny had not been introduced, and two or three looms were as much as one girl was required to attend.

There was a feeling of respectful equality between employers and the employees, who were often invited to their houses."

When the changed industrial conditions of to-day are realized, the necessity for change in law becomes apparent to the legislator.

Throughout the country, change is still being attempted by an endeavor to patch up the old law of negligence and make it fit the new conditions of industry. This attempt must fail; it is only putting new wine into old bottles.

The alternative to negligence law is a so-called compensation law, and the question for the law-maker, therefore, becomes "What kind of compensation law?"

To determine this, the aid of the economist to supply the facts is necessary. In America there is less reason to warn against the economist who reasons on theoretical grounds, such as the universal economic law—the natural law, than there was in Germany. Even in Germany their economists finally conceded that the question was not to be dealt with on theoretical rules of economy or natural law, but that economic doctrine must wait upon facts and be determined by the facts. What America wants from the economist is realistic political economy, based upon statistical material, and not deductions from rigid theoretical premise. The law-maker, therefore, must first endeavor to secure the facts concerning accidents in the indus-

tries he deals with, and even though he cannot secure all he needs, he can secure sufficient to guide him.

The law-maker must next realize that practically all of the existing evils to-day that surround the treatment of industrial accidents on the negligence basis, are traceable to the one word, "uncertainty."

That uncertainty presents itself in a double aspect; "uncertainty as to the responsibility" for the accident when it happens—and second, "uncertainty as to the medical or surgical facts."

As a direct result of these two uncertainties, we find great hardship upon the employee, and great hardship upon the employer. As the employee does not know whether his employer is responsible to him or not, the lawyer becomes necessary to get rid of this uncertainty. The employer soon learns that the employee has called in a lawyer, and the antagonism created by law between them becomes acute; expense for the lawyer is involved, examination of the facts surrounding the accident must be made, testimony of witnesses taken and, possibly after long delays, ultimate trial in court must be had to determine the responsibility. The employer is in exactly the same position, he must have every accident investigated, he must consequently engage a lawyer, and also take testimony of witnesses and be prepared to fight a suit at law to get rid of his uncertainty, in every accident; sometimes these unpleasant duties are transferred by the employer to an insurance company.

If one stops a moment to consider the thousands of accidents happening in the United States in a single year, it will be unnecessary to emphasize the shocking waste of energy, brains and money in getting rid of the mere uncertainty "as to whether the employer is responsible or not."

"Uncertainty as to the medical facts" is also as important as a factor conducing to disagreement, as is uncertainty of responsibility. The employee has no medical attention provided for him by an employer, who "perhaps" owes him nothing. Every lawyer who has tried personal injury cases is familiar with the universal doubt as to how much the man is incapacitated, "the disagreement of doctors" being an expensive uncertainty. Many a settlement would be made by employers if they knew that the man was injured to the extent that he claims he is: many a settlement now made would be refused by the employee if he realized "how permanent" his injury was.

Law-makers must, therefore, fix a system of absolute responsibility before the accident happens; and also devise a system of ascertaining quickly and definitely the medical facts—a compensation law would only accentuate the necessity for the latter, if they wish to obviate the glaring disadvantages of the present system.

So far as one can judge of the present attitude toward this subject throughout this country to-day, it would seem clear that both employers and employees are agreed generally, in favor of discarding the system that requires proof of negligence and substituting a fixed and definite responsibility for an accident before it happens, and a system for quick determination of the extent of the injury to the injured after the accident happens.

If this be true it would seem that the ground underlying any controversy on the subject between the employer and employee is narrowed to one word, "expense." What amount of expense will the industry stand. What amount of expense will enable adequate compensation under a compensation law to be paid.

All of you here familiar with insurance know that the cost of selling insurance to-day is high. That the cost of investigation of accident is high. That much of the abuse directed against the insurance companies, is from those who fail to recognize that they are helpless to change the present ambulance, lawyer, and claim agent system, which is based upon the fact that the law makes the interest of the employee and employer antagonistic directly an accident happens, through the uncertainty of their rights and obligations.

When all abuse is put on one side, the fact remains that by removing the necessity for legally investigating every accident and preparing to fight it in the courts if suit be brought, and by enabling the extent of the injury to be determined with certainty and quickly, and also by getting rid of, as far as possible, the waste of competitive selling, a large part of the expense of insurance would be removed.

Uncertainty produces expense. The "uncertainty" in the New York Compensation Law was largely responsible for the high rate of insurance fixed under it.

If both a compensation law remedy and the present negligence law remedy be left side by side, or as alternatives, uncertainty results. Each accident being a potential suit producer, all the existing abuses must continue; the same necessity will exist for investigating every accident, the same activities of lawyers and much of

the same negligence law expense will continue, with the addition of the expense for a compensation law. A few years ago, I had occasion to secure from a leading insurance company an estimate of the cost of a suggested Massachusetts workman's compensation bill. The bill left the existing negligence remedy as an alternative. After computing the cost of the compensation bill, the insurance company simply added to that cost the full price it was then charging for insurance against the existing negligence remedy. The result will be that employees' allowances under the compensation law will be reduced in amount, if a double or alternative remedy be left side by side with it.

The fact that the expense to the employer involved under any compensation law depends entirely upon the conditions in that law, proves that estimates in advance of the drafting of the law are of no value. Both parties in their attempt to reach an agreement should remember that the expense exists at the opposite ends of the disablements, so to speak. A very heavy part of that expense arises from the innumerable short-term injuries that last only a few weeks. If these be cut out the expense is reduced. Another heavy part of the expense results from the long-term permanent disablements, namely, those disablements that last during life. It is important to the law-maker to know at which end, employer and employee desire to have their expense reduced if they wish to increase the amount of benefits. Should injuries that are trivial be excluded; should permanent injuries only be compensated for a limited period, allowing the injured to fall back upon his family or public charity at the end of that period, or should they be continued during his life?

The extent to which prevention of accident will result from a compensation law will also affect the expense. I have recently made inquiries on this point of government inspectors and of employers and employees' organizations in England, where the statistics show an increase in the short-term injuries since the compensation laws went into effect, and where a special committee has been appointed to inquire whether any actual increase of accidents had occurred, and if so, the cause of it. The result of inquiry showed that causes other than the compensation law had tended to increase accidents; that the compensation law by making a definite expense follow every accident had tended to reduce accidents; that the statistical increase was largely due to fuller reporting of the

accidents that occurred. So the history of compensation laws continues to be, as it was stated to be by the Premier who passed the bill in England, "the history of a great machinery for saving human life."

The new basis of the law incident to employment and resulting accident, is in reality a reversion to the old form of absolute liability for the acts of a servant, and this brings me to the final matter which is a difficulty of the law-maker's work, namely, that of producing a law which will constitutionally accomplish the objects above enumerated. We must wait until the Supreme Courts of other states besides the one in New York have expressed their views, before coming to a conclusion as to the constitutionality of compensation laws. I believe an opposite result may be reached by other states and a basis for constitutional enactment be found in the fact that "he, who for his own profit starts a dangerous force in motion may be held responsible for the injury it causes to others."

The legislators may be enabled to constitutionally adjust the law to the social policy of to-day, as legal history teaches us it has hitherto done. And as Dean John H. Wigmore, in his History of Tortious Responsibility suggests, possibly the satisfying of the demands of public convenience may find justification both theoretically and historically in the employment of a substitute more or less "at peril." I attach herewith my

PRELIMINARY BRIEF ON THE POWER OF CONGRESS TO IMPOSE AN ABSOLUTE LIABILITY IRRESPECTIVE OF NEGLIGENCE UPON AN EMPLOYER, FOR ACCIDENTS TO HIS EMPLOYEES IN HIS BUSINESS.

Is imposing an absolute liability upon an employer irrespective of his negligence, for all accidents to his employees, which occur during, and arise out of, their occupation, within the inhibition of Art. 5 of the Amendments to the Constitution "that no person shall be deprived of his life, liberty or property without due process of law."

18 How. 272 Murray v. Hoboken Land Co.

"Due process of Law," has been held in Murray *v.* Hoboken Land Company to be synonymous with, "the law of the land" in Magna Charta—which is a statute declaratory of principles of the common law (Cooley's Constitutional Limitations.)

There is no departure from the theory of law in legal recogni-

tion of substitutive rights and liabilities developed by changes in conditions, (the law contemplates change as conditions change—otherwise common law rights would still be restricted to those in the Writs of Westminster Hall.)

110 U. S. at 530 Hurtado v. Cal.

In Hurtado *v.* California 110 U. S. at 530, Mr. Justice Matthews said: "The flexibility and capacity for growth and adaptation, is the peculiar boast and excellence of the Common Law. . . . The Constitution of the United States was ordained, it is true, by descendants of Englishmen who inherited the traditions of English Law and History; but it was made for an undefined and expanding future. . . .

There is nothing in Magna Charta rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and every age. In this country . . . the provisions of Magna Charta were incorporated into Bills of Rights. . . .

. . . here they have become bulwarks against arbitrary legislation; but in that application, as it would be incongruous to measure and restrict them by the ancient customary English Law, they must be held to guarantee, etc.; and in commenting upon the test of what constitutes due process of law, advanced in Murray *v.* Hoboken Land Co. 18 How. 272, which said "We must look to those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors which are shown not to have been unsuited to their civil condition by having been acted on by them after the settlement of this country," and upon the inference therefrom, "that any proceeding not thus sanctioned by usage cannot be regarded as due process of law," Mr. Justice Matthews says at p. 582 "This inference" is unwarranted. The real syllabus of the passage quoted is, that a process of law, which is not otherwise forbidden must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country, *but it by no means follows that nothing else can be due process of law.* But to hold such a characteristic is essential—would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians."

169 U. S. 366 Holden v. Hardy 198 U. S. 45

The opinion in Holden *v.* Hardy says: "The Supreme Court has not failed to recognize the fact that the law is, to a certain extent, a progressive science—(and gives instances of such progress)."

Mr. Justice Holmes after referring to that case, in 198 U. S. 45, says: "Liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion."

219 U. S. 104

And again in 219 U. S. 104 he says, in speaking of the great guarantees of the Bill of Rights (the police power), "judges should be slow to read into the latter *nolumus mutare* as against the law making power."

16 Wall. at 525 Steamboat Co. v. Chase 92 U. S. 102. Sherlock v. Alling.

In Steamboat Co. *v.* Chase. 16 Wall. at 525 (1872) in a note to text, it is pointed out that actions for damage for loss of life were unknown until 1846, Lord Campbell's Act. Yet by statute American Jurisprudence has created such a liability for death. See Sherlock *v.* Alling 93 U. S. where it says at 102, by common law, right of action for personal torts dies with person injured, the statute which allows action when resulting in death "enlarges the liability of parties for such torts."

If examination shows that in England, when so doing was considered to subserve the ideas of social policy of the time, settled usage held a man absolutely liable irrespective of negligence for acts that eventuated in harm; that of itself will be evidence strongly indicative of the freedom from any inhibition, by the fifth amendment, against imposing an absolute liability. Moreover if it be shown that such an absolute liability has, in the subsequent successive adjustments of the law to social policy, been continued, for certain classes of such acts, to the time of the emigration of our ancestors, and further has been acted upon by them after settlement of this country, the freedom of Congress in relation thereto would be conclusively established—without further inquiry into whether owing to changed conditions of industry other justification of such freedom of Congress exists (outside of such usage in England and this country).

Historical Test.

The history of responsibility for tortious acts has been examined into by legal writers, and the courts have dealt with it.

John H. Wigmore's history of Tortious Acts is a critical historical examination which shows that the common law has always known an absolute liability, irrespective of negligence and shows that a primitive absolute liability for harm existed which was universal in all races.

A manifestation of this was the liability of a master to his servant's relatives for his death, even accidental, where the business has been the occasion of the evil. L. L. Hy. I: 90 (Brunner Deutsche R.) a person was considered the "causa mortis" who sent another person away on his business, if that other lost his life executing the order; an accident was imputed to, the master as homicidium, if his servant lost his life by misadventure, by reason of a tree or of fire, etc.

The state of the law towards harms caused by personal deeds, by animals, by inanimate things, or by servants or slaves are shown to have passed through similar successive stages.

First the primitive absolute liability for them (liability being visited—on the visible offending source of the visible evil result.)

For personal deeds, in the next stage, misadventure becomes a ground for appeal to the King to remit the punishment due, killing in self defence even requiring pardon by the King (Bracton mentions a case of pardon in 1234 of a man who defended himself against a burglar in his own house). In the next stage the fine is reduced (Laws of Henry I "when result not intention is blamable, judge must fix a small fine as really accident.") Finally, complete exculpation in the criminal process, if immediate notice is given and an oath taken as to "accident" or "self defence," though, in homicide at least, the slayer pays a fine to the King for the crime—and probably for all torts some compensation to the injured, in England in the 13th century.

As to animals—first the full absolute liability. Then the owner was still liable for the wergeld for harm done unintentionally,—but was released from the blood feud. Then exculpation, by delivery up of the animal (at first for private vengeance and later for public punishment) often accompanied by oath "that the owner was not aware of the animal's vice." Laws of Alfred (871-901). "If a neat wound a man let the neat be delivered up or compounded for." Fitzherbert (1333). "If my dog kills your sheep, and I freshly after the fact tender you the dog, you are without recovery against me."

Inanimate things: First the absolute liability. Then the forfeiture—as in the case of Deodand: (the idea of forfeiture is illustrated in a case quoted in Holmes' Common Law. "If my horse strikes a man and the man dies the horse shall be forfeited.") Sometimes with exculpation by oath—(Laws of Henry I "If a man put down his arms, and another does harm with them, the owner must free himself by oath"); finally a foreshadowing of the test of due care or the like.—(as under the laws of Alfred, liability exists if an injury is caused by a spear held with point three inches higher than end of shaft, otherwise none).

As to harms connected with a servant: At first here too was absolute liability of the master, later modified by surrender at first to the injured families, then to the courts for justice—(Laws of William I, C 52. "All who have servants are to be their pledges—and must have servant before The Hundred, for trial—if he flees master shall pay"). The exculpatory oath denying connivance with deed, avoided criminal, but not civil, liability. And by the 13th Century appears the test of responsibility, soon after extended to the civil liability of "command or consent" . . . "Bracton's Note-Book" (1233): case in which disseisin justified, "because he did not sanction the deed, nor did any one lay it before him.")

It is seen from the foregoing that "absolute liability for harm, irrespective of negligence," was imposed by early law, not only in England, but in other countries. In following on the developments of the law in England is shown a constant adjustment to the prevailing notions of the time by the tests of responsibility adopted in the judges' decisions, and it can hardly be urged with reason that such adjustment is rendered impossible now by words

adopted in our Constitution from Magna Charta, which was operative in England when such adjustment was there so made. Thus in 1200, as the author points out, for harm done unintentionally and personally, no distinction was yet made as to negligence; an act was then either "intentional," or "unintentional"; and that this fitted the prevailing ethical notions of that time.

In 1500 came a sloughing off, of the primitive notion that a voluntary act causing harm was inevitably followed by civil responsibility, and a defendent might defend himself by appeal to some standard of moral blame or fault—such as "inevitable necessity"—America recognized that the precedents involved this in 1835 (see Brown *v.* Kendall, 6 Cush. 292, quoting Vincent *v.* Stinehour), but it was not settled in England until 1875, Holmes *v.* Mather (there it is not always a defence).

As regards self defence: It is shown that though in Crown cases in 1278, pardon was only granted by King's favor, by 1400 in civil cases it was a complete defence (14 H. VI. pl. 72.)

Infants and lunatics: Are still held civilly liable as late as 1611 (Bacon's Maxims VII) on ground that intent was immaterial.

As to Fires: Absolute responsibility in its strictest form continued until the legislature abolished responsibility for accidental fires in houses in 1712 (see Tuberville *v.* Stamp—1698).

As to animals: A liability existed—for biting and wounding—(excused by oath if vice unknown, except where animal naturally vicious, Macon *v.* Keeling. 1 Mod. 332, 1700),—*for land trespass*—the old absolute liability remained (except for cattle driven along the highway, the dog also being an exception. Doc. and Stud. 1718.)

Other classes of Acts. These are shown to have been affected by the principles—of liability, if act unlawful, for consequential damage (Scott & Shepherd 2 Wm. Bl. S. 93)—of doctrine, *sic utere tuo ut alienum non laedas*—of absence of right of action for, mere nonfeasance; so that "the action on the case for a mere negligent doing was of little consequence until the 1800's.

Rylands v. Fletcher.

By 1866 some of these other classes of acts, were grouped, under a phrase "at peril" old in the law, in a general category of classes of acts at peril (which gathered in, the other cases of absolute liability) by Mr. Justice Blackburn, in Rylands *v.* Fletcher L. R. I. Exch. at 282, which imposed an absolute liability irrespective of negligence. The author points out that all American Courts have adopted consciously or unconsciously the principle of Rylands *v.* Fletcher, which furnished four main categories,—acts done wilfully,—at peril,—negligently,—and non-negligently,—with reference to that harm, though some have reduced its application to narrow limits.

The development of responsibility for harm done by servants and other agents—shows that in one specific case, *i. e.* for fire, the old strict absolute liability of the master continued through the 1600's (Tuberville *v.* Stamp I Ld.

Raymond 264 1698) though the "command or consent" test of responsibility had in other cases made way against his absolute civil responsibility, which test between 1700 and 1800 developed into an "implied command from a general command or authority."

This later test is shown to be an adaptation by the Court decisions, of the expediency required by change in conditions of industry and commerce (and the judges being content with "the policy of the rule" took refuge in the phrases—*qui facit per alium facit per se,* and *respondiat superior*). That test gave way to the present "scope of employment" test, and so illustrates a conscious effort to adjust the rules of laws to the expediency of mercantile affairs.—The author suggests that both theoretically and historically, the employment of a substitute "more or less at peril" may be demanded by public convenience.

Current English Law Pollock 7.

A leading writer on the subject of torts in England, Pollock, makes a group of wrongs, consisting of breaches of "absolute duties" attached to—fixed property—to certain public callings—and to custody and ownership of dangerous things, liability for which, results "partly from ancient rules of the common law and partly from the modern development of the law of negligence." He suggests reasons for the stringent liability in Rylands *v.* Fletcher, requiring a man to bring water on to his land "at his own risk" (p. 18 viz., "whether to avoid the difficulty of proving negligence, or only to sharpen men's precaution in hazardous matters," and for a similar liability for carriers and innkeepers ("a very ancient part of our law"): viz., "whatever the original reason as a matter of history it was quite unlike the 'reasons of policy,' governing the modern class of cases of which Rylands *v.* Fletcher is a type and leading authority and which must defend them as a part of, modern law if they can be defended at all." In discussing the cases where a strict duty has been imposed he says (p. 598) they have been consolidated by modern authorities on the ground of "the magnitude of danger" and the "difficulty of proving negligence," and adds that as laying down a positive rule of law "the decision of Rylands *v.* Fletcher is not open to criticism in England." It, he says, is based in part on evidently hazardous character of the state of things artifically maintained, in part assimulated to a nuisance, in part to old theory that a lawful voluntary act is "*prima facie* done at peril," which modern authorities do not encourage in England and have explicitly rejected in America (citing Nitroglycerine Case (1872)—15 Wall. 524, and Brown *v.* Kendall (1850)—6 Cush. 272).

Rylands v. Fletcher.

Other Cases of Absolute Responsibility.

Among other cases of absolute, or all but absolute responsibility are cited—Cattle trespass: Owner bound to keep from straying "at his peril"; (an old and well settled head)—Owners of dangerous animals: liable for mischief without proof of negligence—Fire, firearms and noxious fluids: No English case (not a recognized exception) where "unsuccessful diligence held to exonerate"; Duty of keeping fire; "custom

of the realm must safely keep his fire" (author doubts whether negligence the gist of the action): Locomotives: late decisions, one who brings fire into dangerous proximity to his neighbor's property as engines on a railway, without express statutory authority (rule in case cited is expressly stated to be application of principle of Rylands *v.* Fletcher)—or a traction engine in a highway, does so "at his peril" (author doubts the historical foundation of the doctrine): Firearms: says Dixon *v.* Bell (5 M. & S. 198) decision amounts to, "only caution adequate in law is to abolish its dangerous character altogether":

Explosives: bound to notify danger in sending to a carrier, otherwise liable for damage, etc.—

Acts at Peril. Inevitable Accident.

For inevitable accident, from a lawful act done in a careful manner, after examination of the cases, he says that under the older authorities, a man acts at his peril and is liable for the consequence of his voluntary acts: Whereas modern law supports the view that inevitable accident is not a ground of liability.

Holmes Common Law

In this work Mr. Justice Holmes says: "There are two views: a. Torts based on *Moral* wrong; or b. A man acts at his peril, and if damage ensue, if the act is voluntary, it is immaterial that 'not intended nor due to negligence.'"

He examines the precedents in early cases, which apparently held an absolute liability for trespass, and suggests there are strong grounds for believing the decisions were founded on opinion that there was blame, and that consequently the common law has never known "the rule that a man acts at his peril," although he admits that it has been adopted by some of the greatest common law authorities. He calls attention to weighty decisions adverse to it and says that if such later cases are, however, innovations upon it, the *change was politic.*

Beven on Negligence.

Beven examines the English cases and also the American decisions. He says of the two views, each view expresses an aspect of the true view, which is a combination of both.

After review of the cases he says it appears—that in not one of the cases cited is the rule that a man acts at his peril borne out in all its unqualified breadth. On the other hand, those cited in support of the laxer view are not inconsistent with those vouched for the more exigent.

He criticises the view of Justice Holmes that the doer of a lawful act is not liable in trespass. Beven's view is that Lawful Acts must be distinguished into:

1. Those absolute and obligatory duties—like the jailor's in Bessey *v.* Olliot.
2. Exercise of legal right, lawful so long as do not interfere with others—i.e., beating a dog in street for a previous fight—and
3. Things done under inducement to act,—separating his own dog fight-

ing (Brown *v.* Kendall Case)—"Trespassers to save life" on railway lines, who may recover, (as a duty which everyone owes to society). In other words, where action is more beneficial to the community than inaction, the law protects reasonably careful action with immunity.

He concludes that the law of England is settled by Rylands *v.* Fletcher; and is not that a man in all circumstances be "on the alert to avoid receiving injury," as would result from Stanley *v.* Powell being held good law.

Sher. & Rel. on Negligence.

In this work (note to s. 486 *et seq.*) in speaking of the duty of carriers is said: "the obligation of carriers of goods is absolute, their liability does not depend upon their being negligent."

NITROGLYCERINE CASE.

(15 Wallace 524—1872.)

After discussion of the general ignorance of this newly discovered substance on page 529, Mr. Justice Field on page 535 says: the lower court found that neither the defendant, nor any of their employees knew the contents of the case, or had any reason to suspect its dangerous character, and that they did not know anything about nitroglycerine, or that it was dangerous, and that there was no negligence in receiving the case, or in their failure to ascertain the dangerous character of the contents and in the handling of the case.

He says: "No one is responsible for injuries resulting from unavoidable accidents whilst engaged in a lawful business." After distinguishing the cases between passengers and carriers, for injuries, on the ground of "contract to carry safely," he says "here the case stands as one of unavoidable accident, for the consequences of which the defendants are not responsible. The consequences of all such accidents must be borne by the sufferers as his misfortune."

He says this principle is recognized and affirmed in a great variety of cases—fire originating in one man's building extending to the property of others; injuries caused by fire ignited by sparks from locomotives; or caused by horses running away; or by blasting rocks.

The rule deducible is that the measure of care against accident, to avoid responsibility, is that which a person of ordinary prudence would use. He goes on to say the direct or remote consequences may determine the form of the action, whether case or trespass, but cannot alter the principle upon which liability is enforced or predicated. He cites Brown *v.* Kendall 6 Cushing 295, (action was in trespass) and says that Chief Justice Shaw held defendant was doing a lawful act, and if while using due care injury occurred, defendant was not liable. He cites Harvey *v.* Dunlap Lalor's Reports 193, (action was trespass for throwing stone at plaintiff's daughter by which eye put out—it was accidental and was held plaintiff could not recover): He quotes Mr. Justice Nelson's remarks "No case of principle can be found, or if found can be maintained, subjecting an individual to liability for an act done without fault on his part,"—and adds "in this conclusion we all agree."

BROWN *v.* KENDALL.

(6 Cushing 292—1850.)

Facts: two dogs fighting in presence of masters; defendant took stick to separate them; plaintiff was looking on; stick accidentally hit plaintiff in the eye inflicting severe injury. Shaw C. J. "This is an action of trespass. . . . Facts preclude the supposition blow was intentional . . damage was unintentional. The result of all the authorities is; that plaintiff must come prepared to show either that the intention was unlawful, or that the defendant was in fault. If then using due care he accidentally hit the plaintiff in the eye, this was result of pure accident, or involuntary or unavoidable, therefore the action would not lie.

A DIFFERENT VIEW OF THE COMMON LAW LIABILITY IS FOUND IN DECISIONS OF CERTAIN OF THE STATES.

This is illustrated in 60th Ohio State 560, Brad Glycerin Co. *v.* St. Mary Mfg. Co., the Syllabus (which is in Ohio made the law) says "Nitroglycerin is highly dangerous. And one who stores it on his own premises is liable for injuries to surrounding property by its explosion, although he neither violates any provision of the law regulating its storage, nor is chargeable with negligence contributing to the explosion."

The case distinguishes responsibility for steam boilers, from that for nitroglycerin, storing gun-powder, or blasting rocks, and says that public policy which seeks to secure the welfare of the many may demand a modification for boilers, of the strict rule of liability.

The case also specifically approves the doctrine in Rylands *v.* Fletcher, which it says has been approved in 106, 125 and 135 Mass., and in Cahill *v.* Eastman, 18 Minn. 324 (1871), which held the defendants liable without any negligence in construction and maintenance of a tunnel. That case examines at length the authorities and says as regards Brown *v.* Kendall, "the circumstances were such as to show plaintiff had taken the risk on himself, he voluntarily assumed a position, in which risk of collision was apparent."

ST. LOUIS, SAN FRANCISCO RY. *v.* MATHEWS.

(165 U. S. 1.)

(1896.)

In 165 U. S. 1, Railway Co. *v.* Mathews a statute of Missouri imposing an absolute liability upon railroads for fire was passed upon, and it was held that though imposing an absolute liability for doing a lawful act and conducting a lawful business in a careful manner, the statute did not violate the Constitution of the United States. The argument that it did, was met by tracing the history of the law regarding liability for fire. Mr. Justice Gray said that this country had not adopted generally the strict rule of the English Common Law, but the matter had been regulated by statute ever since the Massachusetts statute of 1631. He shows that in 1840, Massachusetts passed a statute making the liability of railroads absolute for fire, not dependent upon negligence, that in Vermont, Maine, New Hampshire, Con-

necticut, Colorado and South Carolina, similar statues had been passed and after examination of decisions and authorities the following conclusions are reached:

First. England from earliest times held any one lighting a fire on his own premises to strictest accountability for damages by its spreading.

Second. Earliest statute which declared railroad corporation absolutely responsible independently of negligence for fire, was passed in Massachusetts, in 1840, soon after engines had become common.

Third. In England, then, undetermined whether railroad liable without negligence, as at common law, for fire, and result that it was not liable, after conflict of judicial opinion, only reached, when Parliament had expressly authorized corporation to use engines and had not declared it to be responsible.

Fourth, From 1840 validity of Massachusetts statute and similar statutes, upheld in every state of Union, in which question has arisen.

He adds that the constitutionality of such statutes has been assumed in 91 U. S. 492, and rests upon principles often affirmed by the Supreme Court. He then quotes Chief Justice Shaw (in Com. *v.* Alger) to the effect that it is a settled principle of well ordered society that every property may be regulated so that it shall not be injurious to the equal rights of others to their property, nor to rights of the community; and quotes from cases declaring the police power and the rights of a state in relation to charters of corporation.

He sums up the motives and risks which justify the legislation as follows: Fire a destructve element which when it has once gained headway can hardly be controlled. Railroads to carry out public object, authorized to use steam generated by fire. It is within the authority of legislature to make adequate provision for protecting the property of others against loss by sparks from engines. The right of the citizen not to have his property burned without compensation is no less to be regarded than the right of the corporation to set it on fire.

To require utmost diligence might not afford sufficient protection. When both parties equally faultless, legislature may properly consider it just that duty of insuring private property against loss by use of dangerous instruments should rest upon the railroad which employs the instrument and creates the peril for its own profit, rather than upon the owner of the property who has no control over or interest in those instruments.

In conclusion he says the statute is not penal, but it is purely remedial, making the party doing a lawful act for its own profit, liable in damage to the innocent party injured thereby. The statute is a constitutional and valid exercise of the legislative power of the State.

174 U. S. 96 Railroad v. Matthews.

In 174 U. S. 96, the Supreme Court held constitutional a statute of Kansas making fire, and damages, caused by operating the railroad, *prima facie* evidence of negligence against railroad, and allowing a reasonable attorney's fee as part of damages in a recovery under it, contributory negligence being considered in estimating damages.

Mr. Justice Brewer said the purpose is to secure the utmost care of railroad companies to prevent the escape of fire. Its monition is "see to it that no fire escapes from your locomotives, if it does you will be liable." The dangerous element employed and hazards to persons and property, arising from running of trains justifies such a law.

The Court cites a Kansas law of 1860, the effect of which was to change the rule of the common law, which gave redress only when the person setting fire did so through negligence, whereas this statute by mere fact of setting fire gave a right to recover damages.

In discussing the question whether prescribing a penalty without imposing a statutory duty to take precaution made a difference. The court said: "Our inquiry runs only to the matter of legislative power. If in order to accomplish a given beneficial result the legislature has power to prescribe a specific duty and punish a failure to comply therewith by a penalty, has it not equal power to prescribe the same penalty for failing to accomplish the same result, leaving to the corporation the selection of the means it deems best therefor. . . We may think it better that legislation should be like that of Missouri, prescribing an absolute liability instead of that of Kansas, making the fact of fire, *prima facie* evidence of negligence, but . . . forms are matters of legislative consideration, results and power only are to be considered by the courts." Justice Brewer had referred to the Missouri statute held valid in Ry. *v.* Mathews 165 U. S. 1.

As regards the liability of carriers for damages.

183 U. S. 582. v. Zernicke

The Supreme Court held constitutional, the Nebraska Railroad incorporation law, requiring that railroads "shall be liable for all damages inflicted upon passengers, except from the *criminal* negligence of the person injured (or violation of regulation actually brought to his notice). Though the decision turned chiefly on the incorporation contract.

The Court said: Regarding as extending the rule of liability for injury to persons which the common law makes for the loss of or injury to things, the statute seems defensible. And it was upon this ground that the Supreme Court of the state defended and vindicated the statute.

The Court goes on to say: Our jurisprudence affords examples of legal liability without fault, and the deprivation of property without fault being attributable to its owner. The law of deodands was such an example. The personification of the ship in admiralty is another. Other examples are afforded in the liability of the husband for the torts of the wife,—the liability of a master for the acts of his servants.

A master is entirely without negligence, if an accident in his business be caused by the negligence of a competent fellow servant, yet statutes imposing responsibility on him for the negligence of fellow servants are upheld.

127 U. S. 205. v. Mackey.

In 127 U. S. 205, a statute of Kansas which made railroad companies responsible to their servants for negligence of their fellow servants, was upheld, as not violating the Fourteenth Amendment.

Mr. Justice Field when dealing with the contention that the law imposes a liability not previously existing and thus authorizes the taking of property without due process of law, after discussing the right of the states to prescribe liabilities for corporations, he adds. . .

"The supposed hardship and injustice consist in imputing liability to the Company, where no personal wrong or negligence is chargeable to it, or to its directors. But the same hardship and injustice exist for injuries to passengers."

And in dealing with "equal protection of the laws" he says: "But the hazardous character of the business of operating a railway would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employees as well as the safety of the public. As said by the Court below, it is simply a question of legislative discretion whether the same liabilities shall be applied to carriers by canal and stage coaches and to persons and corporations using steam in manufactories."

These authorities seem to indicate that:

English Common Law started with absolute liability, irrespective of negligence, for harmful acts.

That such liability was modified from time to time by judicial decision and statute to suit the prevailing ideas of social policy. That in accordance with such social policy such absolute liability remained for certain classes of acts. That it exists to-day for the custody and ownership of dangerous things, such as fire. That a man acts at his peril in certain situations, such as in creating a dangerous reservoir on his land, (Rylands *v.* Fletcher), and that a rule of absolute liability is moreover attached to certain contractural relations and callings, such as carriers of goods and apparently innkeepers. In the United States, too, it is seen that the Supreme Courts of certain of the states have adopted the doctrine of Rylands *v.* Fletcher, and admitted the existence in their common law of instances of absolute liability, irrespective of negligence. That the Supreme Court of the United States in decisions later than the Nitroglycerin case, has given recognition to the fact that such instances of liability irrespective of negligence, exist under the English Common Law (Zernicke Case), and exist in the texture of our law (as in the rule of master's responsibility for competent agent's negligence). It will be seen also that state statutes imposing an absolute

liability have been upheld by the Supreme Court of the United States, citing as justification, reasons of policy, such as protection of employees and safety of the public (Mackey case), and the difficulty of proving negligence, and justice, (Mathews case—just when both parties equally faultless duty of insuring against loss should rest on railroad, which creates the peril for its own profit), under the police power, as well as under the power of a state over corporations.

From statements made by the Supreme Court, it would appear, too, that development of the law in accordance with the needs of the times is not to be discouraged.

It has recently been decided in the Employers' Liability cases (207 U. S. 463), that Congress has the power under the Commerce Clause to regulate the relations of master and servant in interstate and foreign commerce as regards accidents in that commerce. Can it then be doubted that the Supreme Court would uphold the power of Congress, if in so doing it should see fit to adopt a rule of absolute liability irrespective of negligence for accidents to employees incident to such commerce, a rule that the whole experience of the civilized world has adopted as both expedient and just—thereby discarding the rule which requires proof of negligence, which that experience has proved to be inexpedient and unjust.

If such a statute be held unconstitutional by the Supreme Court of the United States, it must be so held, it seems to me, on grounds other than its imposing a rule of absolute liability, irrespective of negligence.